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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

vs.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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22 pp

QUESTION PRESENTED

Does a college admissions system which considers minority applicants' race as a "plus factor," rather than allocating a specific number of slots for minority applicants, violate title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the Fourteenth Amendment?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This Court's jurisprudence in the criminal law is replete with precedents established in cases with no majority opinion.

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   All parties have given written consent to the filing of this brief.

Marks v. *United States*, 430 U. S. 188, 193 (1977) and *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (lead opinion) state a rule for determining the precedent established by such cases, but this rule has proven to be a source of confusion and uncertainty.

This uncertainty and confusion is common to criminal and civil cases. *Gregg* and *Marks* were criminal cases. The application of the *Marks* rule with specific reference to *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978) was mentioned in the oral argument of *Lockyer* v. *Andrade*, No. 01-1127, Tr. of Oral Arg., p. 48, a criminal case. The Court of Appeals' decision in the present case contains a vigorous debate over *Marks*. See *infra*, at 3. Clear resolution of this perennially vexing jurisprudential issue would promote consistency in the criminal law and thereby advance the interests CJLF was formed to protect.[2]

SUMMARY OF ARGUMENT

The proper interpretation of Supreme Court precedents is a matter of great importance. The rule of *Marks* v. *United States* has been the source of great confusion. While this Court can simply redecide the issue *de novo* whenever it finds application of *Marks* to be difficult, no other court may do so. To provide better guidance for other courts, this Court should clarify *Marks* before proceeding to the underlying issue in the present case.

The essence of precedent is that cases which are like the precedent-setting case must be decided the same way. The rules of case law are the rules that define the characteristics that determine which cases are alike for this purpose. That is, the

2. *Amicus* CJLF has no interest in and takes no position on the underlying question of the validity of respondent University of Michigan's admissions program.

rules separate the material facts leading to the result from the immaterial facts, which were merely incidental.

The material facts are all of the facts necessary to determine the result. Where there are multiple opinions, none of which is a majority, every fact deemed material by any of the opinions needed to constitute a majority concurring in the result is a material fact. The resulting rule of law is a rule that defines a set of cases which a majority agrees is like the precedent-setting case and must be decided the same way. The less agreement there is among the opinions, the narrower the resulting rule. A narrow rule means that more is left undecided and to be determined in future cases. The *Marks* "narrowest grounds" rule, properly understood, is merely a special case of this general principle.

The *Bakke* case establishes a precedent for cases which share all the facts deemed material to the result in that case by both Justice Powell's opinion and Justice Stevens' opinion. Justice Powell's discussion of the validity of other possible admissions programs, such as Harvard's, was dictum and not holding. *Bakke* sets no precedent governing the present case.

ARGUMENT

I. The *Marks* rule has caused confusion and requires clarification.

The Court of Appeals' decision in the present case includes a spirited debate on the interpretation of precedents of this Court with no majority opinion. See *Grutter* v. *Bollinger*, 288 F. 3d 732, 739-742 (CA6 2002) (en banc); *id.*, at 780-781 (Boggs, J., dissenting). The rule for interpreting such precedents was first stated in *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) as "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." However, that statement was itself contained in a non-majority opinion, so it remained for

Marks v. *United States*, 430 U. S. 188, 193 (1977) to adopt the *Gregg* rule in an opinion of the Court.

Nichols v. *United States*, 511 U. S. 738, 745 (1994), noted that the *Marks* rule was "more easily stated then applied to the various opinions supporting the result in" the precedent under consideration in that case. The *Nichols* Court continued, "We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Id.*, at 745-746. The Court then proceeded to re-examine and overrule the precedent. That approach was proper for this Court and produced a correct result in that case, but it provided no guidance for other courts faced with a similar problem.

All of the other courts of the Nation are bound to follow this Court's precedents on federal questions and cannot overrule them. See *Agostini* v. *Felton*, 521 U. S. 203, 237-238 (1997). To the extent that a decision of this Court without a majority opinion creates a precedent, all other courts are bound to follow it, see *Horton* v. *California*, 496 U. S. 128, 136 (1990) (no-majority "decision nonetheless is a binding precedent"), but they cannot do so in a consistent manner unless the rules for interpreting the precedent are reasonably clear and workable. Otherwise, there may be as many varying interpretations of the precedent as there were opinions on the underlying issue before this Court accepted it for review. In that event, this Court will have failed in its essential function to establish uniformity in the law. See J. Story, Commentaries on the Constitution of the United States § 827, pp. 589-590 (abridged ed. 1833) (reprint 1987).

The question presented in the present case regarding the role of race in college admissions is certainly an important one, deserving a clear resolution by this Court. However, the jurisprudential question of the precedent established by a case with no majority opinion is also of great importance. This issue will not be resolved if the Court takes the same route it did in *Nichols* and decides the underlying question without resolving

what precedent *Bakke* established. *Amicus* CJLF therefore submits that the preferred route is to decide what the precedent is before deciding whether it controls this case and, if so, whether it should be overruled.

II. Where a case has no majority opinion, the scope of the precedent is determined by the facts deemed material by any of the opinions needed to constitute a majority.

A. Back to Basics.

The rule of *Marks* v. *United States*, 430 U. S. 188, 193 (1977) rule was announced without any discussion of the underlying reasons for it or of the nature of precedent. Some of the difficulties in applying the rule stem from a misunderstanding of its foundation. A brief discussion of the nature of precedent in general is necessary before tackling the more difficult problem of precedent in the absence of a majority opinion.

The essence of precedent is that a new case which is like a previously decided case should be decided the same way. "A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case . . . ." 1 J. Kent, Commentaries on American Law *475 (8th ed. 1854). That is the easy part. The hard part is deciding which cases are alike and which are different in important aspects, given the infinite variations in the complete facts of real cases. See D. Chamberlain, The Doctrine of Stare Decisis: Its Reasons and Extent 11-15 (N. Y. St. Bar Assn. 1885); Schauer, Precedent, 39 Stan. L. Rev. 571, 577 (1987). Despite the many discussions of *stare decisis*, its importance, and its limitations in the opinions of this Court, see, *e.g.*, *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986); *Payne* v. *Tennessee*, 501 U. S. 808, 827-828 (1991), there is surprisingly little in the cases on the nature of precedent itself. The most useful discussion for this purpose can be found in a classic law review article by Cambridge Professor Arthur L.

Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161 (1930).

Goodhart rejects the notion that precedent can be determined solely by looking at the court's "comprehensive expression of the rule involved, which students underline with such enthusiasm in their casebooks." *Id.*, at 164. The limits of such pronouncements can be seen in Chief Justice Marshall's often-quoted maxim "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399 (1821). The connection must be to the facts of the case. For example, the sweeping pronouncements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) were not controlling precedent in a case where police needed to question an arrested suspect at the scene to avert an immediate danger to public safety. See *New York* v. *Quarles*, 467 U. S. 649, 656 (1984). The facts of *Quarles* were materially different from the facts of *Miranda*, which involved a station-house interrogation solely for prosecution, see 384 U. S., at 491-492, in a way not anticipated in the earlier decision and hence not reflected in its language. Goodhart gives the example of sweeping language in a case of a legatee who had murdered his testator, that "no one shall be permitted 'to take advantage of his own wrong . . . .' " 40 Yale L. J., at 166. That rule, in the abstract, would also preclude inheritance by a person who had caused the death of the testator by mere negligence, but the precedent is not properly considered binding in the distinguishable case of a much lesser wrong. Abstract statements of rules, then, do not themselves constitute precedent; we must also look to the facts.

Goodhart also refutes the equal and opposite fallacy, which had been promoted by some scholars at that time, that a precedent is determined *solely* by the facts of the case. See 40 Yale L. J., at 168-169. Rules of law are needed to sort out the material facts which determine the result from those which are merely incidental. See Schauer, 39 Stan. L. Rev., at 577-578. In a case involving the sale of a cow, it is not material whether

the cow is black or brown, but it may be material whether the alleged agreement is oral or written. See U. C. C. § 2-201 (1999) (statute of frauds). These "rules of relevance" are not technicalities, but rather embody our theories of law and the values of our society. See Schauer, *supra*, at 577-578. In a modern case on the competency of witnesses, the race of the witness would be as immaterial as the color of the proverbial cow, but it was not always so. See *id.*, at 578; see also, *e.g.*, Cal. Crimes and Punishments Act of 1850 § 14, 1 Cal. Stat. 230. In the absence of a statute, the facts which make a case like a precedent or distinguishable from it are established by case law, and this is why opinions, in addition to the facts and results of precedents, have a lawmaking function. "It is by his choice of the material facts that the judge creates law." Goodhart, *supra*, at 169.[3] Goodhart summarizes his core principle this way: "The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision based on them." *Id.*, at 182.

An earlier case is precedent for a new case if the two cases are alike in their material facts. The rule of law stated in the earlier opinion is the means of determining which facts are material for this purpose. The rule therefore defines a *set* of cases, which *must* include the case in which it is established, which will be considered alike and have the same result. A court should not announce a rule in a case where the result is not determined by that rule. To do so is to issue an advisory opinion, which is not a proper judicial function. See *Teague* v. *Lane*, 489 U. S. 288, 316 (1989) (plurality opinion).

Goodhart's thesis yields a straightforward principle for interpreting the decisions of multi-judge appellate courts with individual opinions. Every fact is material which was necessary for the case to be decided the way it was. The set of material

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3. Goodhart uses male pronouns for judges throughout his article, which in 1930 was an accurate reflection of reality.

facts is the union of the sets of facts deemed material by the judges needed to constitute a majority. See 40 Yale L. J., at 178-179. This rule establishes a general principle, of which the *Marks* rule is a special case, as discussed further, *infra*. The general principle is illustrated by the fractured opinion on the act of state doctrine in *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759 (1972) ("*Citibank*"). The result of the case is that Citibank was not precluded from litigating its counterclaim by the act of state doctrine. See *id.*, at 762. Three Justices believed that the position taken by the executive branch was the controlling fact. See *ibid.* (plurality opinion). One Justice believed that the fact that Citibank was only seeking a setoff against a claim brought by Cuba was the controlling fact. See *id.*, at 772-773 (Douglas, J., concurring in the result). One believed that there was no interference with "delicate foreign relations conducted by the political branches," and that was the controlling fact. See *id.*, at 775-776 (Powell, J., concurring in the result). None of these opinions is necessarily "narrower" than the others so as to be controlling under *Marks*. Nonetheless, in a subsequent case with all three facts present, *Citibank* was the controlling precedent. See *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 658 F. 2d 875, 884 (CA2 1981).

B. Broad and Narrow.

Focusing on a rule of case law as a rule that defines a set of cases, necessarily including the case in which it is established, we can make more sense of the *Marks* "narrowest grounds" rule. Where the set is defined by material facts, all of which must be present for membership in the set, there is an inverse relationship between the number of facts and the breadth of the rule. But see *Horton* v. *California*, 496 U. S. 128, 136-137 (1990) (different analysis where broader opinion rests on several *alternative* material facts). A large number of required facts means that few cases qualify for membership in the set, and hence the rule is narrow. In *Furman* v. *Georgia*, 408 U. S. 238, 239-240 (1972) (*per curiam*), the result was that the death

sentences were reversed. Justices Brennan and Marshall believed that the death penalty was unconstitutional in all cases. See *id.*, at 305, 369 (opinions concurring in the judgment). Under this view, only one fact was necessary for the result—that the sentence was death. The other three Justices concurring in the result rested their decisions on the additional fact that the sentences were imposed under a system of standardless discretion. See *id.*, at 256-257 (opinion of Douglas, J.); *id.*, at 309-310 (opinion of Stewart, J.); *id.*, at 313 (opinion of White, J.). The set of cases defined by two material facts is a proper subset of the set defined by only one of those facts, and the rule defining that set is therefore a narrower rule.

The narrow rule only governs the set of cases which includes the case in which it is announced. The opinion expressing the narrow rule may indicate what the author believes to be the correct result in cases lacking one of the material facts, but that indication is dictum and not holding. In *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), the plurality opinion could be interpreted as holding that it was sufficient for reversal that the prosecutor's argument diminished the jury's sense of responsibility. See *id.*, at 336. However, the concurring opinion was emphatic that it was the misleading nature of the argument that made it grounds for reversal, and that an accurate description of the appellate process would not be error. See *id.*, at 341-343 (O'Connor, J., concurring in part and concurring in the judgment). In *Romano* v. *Oklahoma*, 512 U. S. 1 (1994), the Court was presented with a case of an accurate representation that arguably diminished the jury's sense of responsibility. It held that *Caldwell* was not controlling, applying the *Marks* rule. The additional fact which the fifth Justice had deemed material in *Caldwell* was absent in *Romano*. See *id.*, at 9-10.

However, it would be a mistake to say that the *Caldwell* precedent *required* rejection of Romano's claim. Instead, this was an issue to be decided in the case that actually presented it, namely *Romano* itself. After holding that *Caldwell* was

distinguishable, the *Romano* Court went on to reject defendant's claim on the merits. See *id.*, at 10-11. As Judge Boggs noted in the present case, the *Marks* rule does not incorporate into the holding of the case "every nuance" of the opinion concurring on the narrowest grounds. See *Grutter* v. *Bollinger*, 288 F. 3d 732, 778 (CA6 2002) (dissent). The opinion on the narrower grounds is only "controlling" because it defines a subset of cases which a majority of the Court agrees is like the case before the Court and must be decided the same way.[4] For the other subset of cases, the broader opinion says they are the same but the narrower opinion says they are distinguishable. This subset does not include the case before the Court and is not controlled by the resulting precedent. The rule which governs that subset must be decided in a future case.

This principle insures that precedents are only set by agreement of a majority of the Court in the course of deciding a case actually before the Court. An opinion of a single Justice cannot be controlling to the extent that it requires results none of the other eight would concur in. This principle also insures that the more fractured the Court's decision, the less is carved in granite, and the more is left to be decided in future cases. This is as it should be, for fractured opinions are less likely to produce sound jurisprudence than postponing the decision of broad principles for a case where the Court can come to a coherent agreement and produce a unified opinion of the Court.

The set nature of the puzzle can be illustrated with the use of Venn diagrams. Figure 1 illustrates *Citibank*. Circle A encloses cases where the executive branch supports adjudication, the plurality position. Circle B encloses cases where the

4. This is also why the *Marks* rule refers only to opinions concurring in the judgment. See *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (not considering *Furman* dissents). One cannot simply count noses for an abstract proposition among the concurring and dissenting opinions, as the Court of Appeals majority noted in the present case. See 288 F. 3d, at 741, n. 6.

claim is a counterclaim limited to a setoff against amounts claimed by the foreign sovereign, which brought the initial action, *i.e.*, Justice Douglas's position. Circle C encloses all cases where the court finds no interference with delicate foreign relations, Justice Powell's position. Both *Citibank*, the dot, and *Chase Manhattan*, the triangle, lie in the intersection of all three sets. Hence, the *Citibank* precedent controls *Chase Manhattan*.

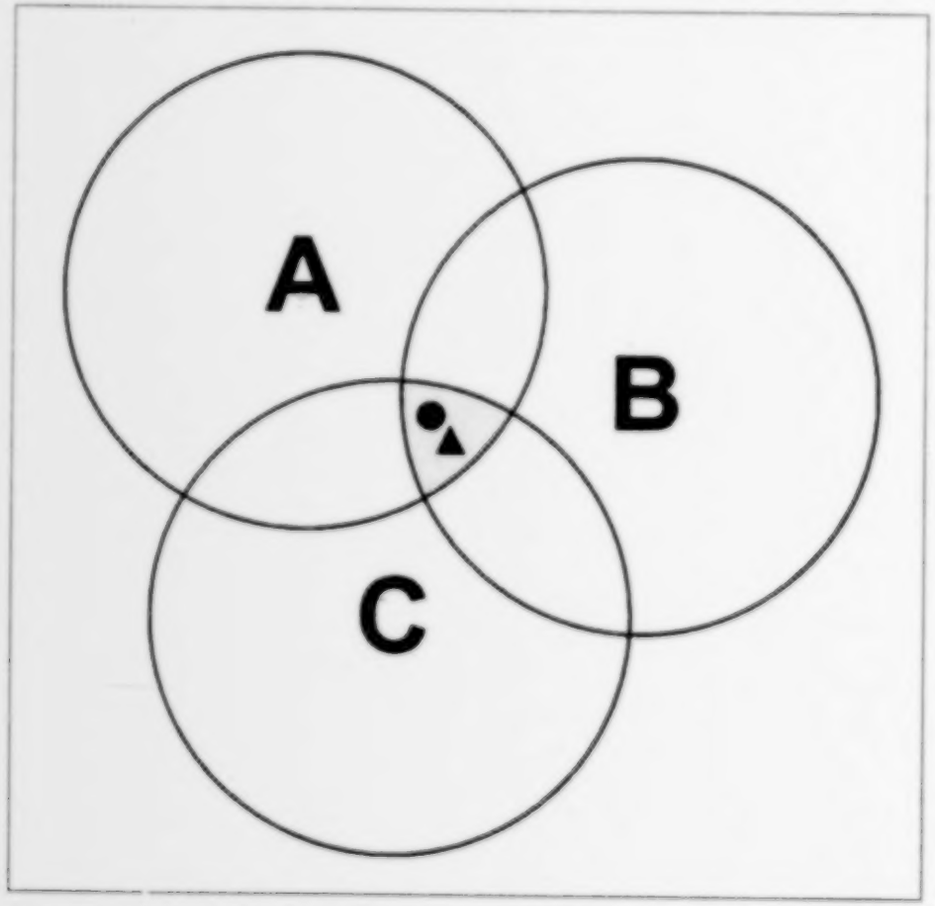

Figure 1 - *Citibank* ● and *Chase Manhattan* ▲.

Figure 2 represents *Caldwell*. The outer circle, A, the plurality's broader rule, encloses all cases where an argument or evidence diminishes the jury's sense of responsibility. The inner circle, B, represents those cases with the additional fact that the argument or evidence is misleading, which Justice O'Connor concurred was reversible error. This smaller set of cases is wholly enclosed in the other, *i.e.*, a proper subset. A majority agrees that cases in this subset are like *Caldwell*, the dot, and require the same result, reversal. The outer ring is the subset where the Justices concurring in the result in *Caldwell* would disagree, *i.e.*, the evidence or argument makes the jury feel less weight on their shoulders, but it is true. *Romano*, the triangle, is in this set, and *Caldwell* was not controlling.

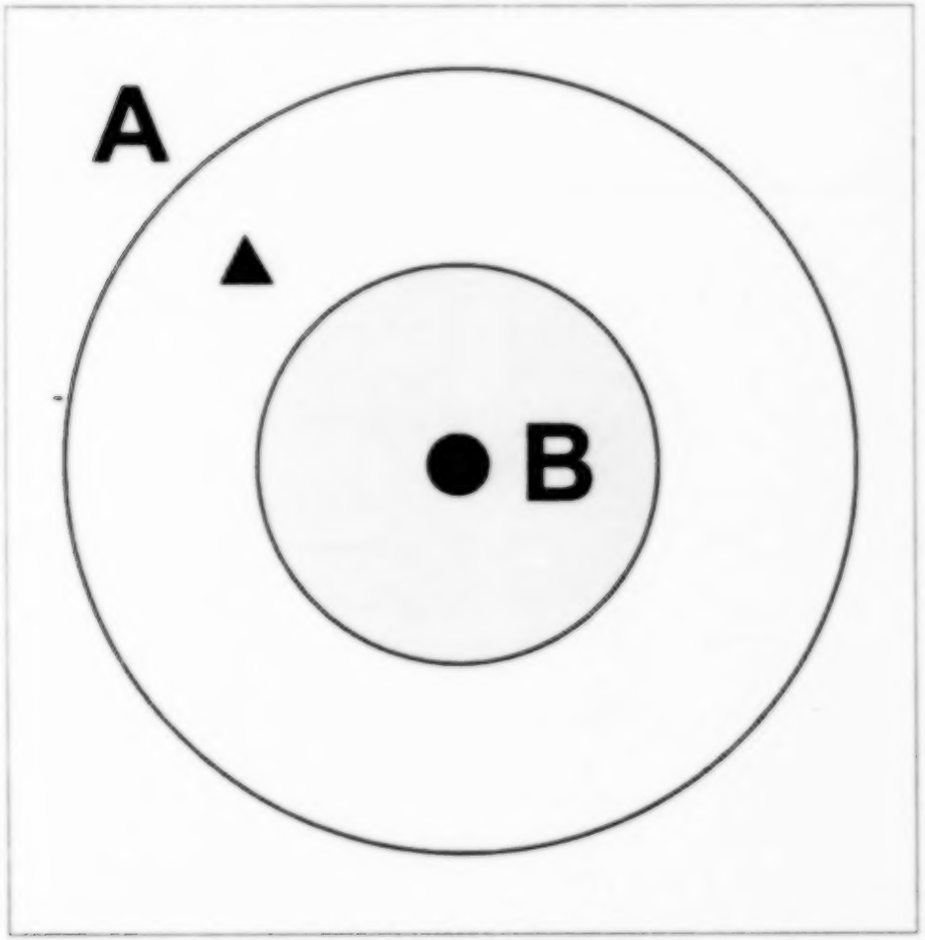

Figure 2 - *Caldwell* ● and *Romano* ▲.

The "narrowest grounds," or subset, rule is really just a special case of the intersection rule. The intersection of a set and its subset is the subset. In either case, the set consisting of all cases which a majority of the Court agrees are like the precedent in all material aspects must be decided the same way. The rule that defines that set is the rule created by the precedent.

III. *Bakke* does not contain a holding controlling in the present case.

"It is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375, 379 (1994). The principles described in part II, *supra*, apply straightforwardly to the holding in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), but they do not fit the dicta. The misfit between dicta and the basic principles of *stare decisis* is useful in making clear what is holding and what is dictum.

Another useful point to keep in mind is the jurisdictional authority of the Court rendering the decision. "Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . ." 28 U. S. C. § 1257(a). The jurisdiction is to review judgments, not opinions. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984); *M'Clung* v. *Silliman*, 6 Wheat. (19 U. S.) 598, 603 (1821). In the *Bakke* case, only the judgment of the California Supreme Court was up for review, not its opinion and not the portion of the Superior Court's injunction deleted by the state high court. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 408-411, and nn. 2-5 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

The facts of *Bakke* are well known. The University of California at Davis Medical School had set aside a certain number of admission spaces, for which Bakke could not be considered because of his race. See *id.*, at 274-276 (opinion of

Powell, J.). The University could not establish that Bakke would not have been admitted if these slots had not been set aside on the grounds of race. See *id.*, at 280. The result in the state court was that Bakke was granted declaratory relief that the special admissions program was invalid, and the University was ordered to admit him. See *id.*, at 410, n. 5 (Stevens, J.); *Bakke* v. *Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 64, 553 P. 2d 1152, 1172 (1976).

The result in this Court was that the judgment actually rendered by the California Supreme Court on the facts of the actual case was affirmed. See 438 U. S., at 320 (program invalid; Bakke admitted). Four Justices concurring in this result believed that the law required " 'colorblind' . . . application." *Id.*, at 415 (opinion of Stevens, J., joined by Burger, C.J., Stewart and Rehnquist, J.J.). In this view, the fact that the Davis program was not colorblind was sufficient to sustain the judgment. The opinion also makes a tangential reference to remedial measures to correct past discrimination, see *id.*, at 418, n. 22, so for the purpose of this discussion we will assume that this opinion also counts as a material fact that the Davis program was not remedial.

Justice Powell's opinion also distinguished the remedial programs. See *id.*, at 307-309. Justice Powell further considered it significant that the program at issue involved "the reservation of a specified number of seats," *id.*, at 315, *i.e.*, a racial quota, as opposed to a program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file . . . ." *Id.*, at 317.

Applying the principles set forth in part II, *supra*, the holding of *Bakke* is that an admissions program that is not colorblind, is not a remedy for past discrimination, and uses a quota rather than a "plus factor" is illegal. What about a different program that does use a "plus factor" rather than a quota, *i.e.*, the present case? Thus far, it would appear that *Bakke* does not control. Justice Powell's discussion of a program not before the Court would seem to be a prime

example of *obiter dicta*, which would not be binding precedent even in a majority opinion, much less in an individual opinion. Just as Justice O'Connor's discussion of accurate statements in *Caldwell* was not controlling when the issue actually came up in *Romano*, so Justice Powell's approval of the Harvard plan in *Bakke* should not be controlling here.

The complicating wrinkle is the statement in part V-C, "so much of the California court's judgment as enjoins petitioner [the university] from *any* consideration of the race of *any* applicant must be reversed." *Id.*, at 320 (emphasis added). Applying the method of part II, *supra*, to this "holding," we run into a brick wall. What are the material facts of the case before the Court that support this result? There are none. The university had not attempted to use race in any manner except its now-invalidated program. No other applicant was before the Court; it was not a class action. See *id.*, at 408 (opinion of Stevens, J.). Most importantly, no such injunction was contained in the only judgment this Court had jurisdiction to review. See *id.*, at 410-411.

Goodhart's method of determining the *ratio decidendi* of a case founders on this "holding" of *Bakke*, not because the method is flawed but rather because this is dictum and not holding. The implications of Justice Mosk's opinion for the California Supreme Court regarding future programs and applications, see *id.*, at 271, n. †, were not before the Court, because, as noted *supra*, at 13, the Court's jurisdiction is to review the judgment and not the opinion. For a court to expand the scope of its precedent by inventing and reversing a nonexistent injunction exceeds the proper lawmaking function of the judicial power.

Properly analyzed, the actual, narrow holding of *Bakke* resolved the quota question and left the "plus factor" question for another day. That day has now arrived.

CONCLUSION

This Court can and should decide the legality of the University of Michigan Law School's admissions program without any *stare decisis* constraint from *Bakke*.[5]

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Respectfully submitted,

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5. As noted in the Interest of *Amicus* section, *supra*, at 2, CJLF takes no position on the ultimate issue in this case.